

AUG 28 1979

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IN THE  
**Supreme Court of the United States**

**OCTOBER TERM, 1979**

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No. 79-160

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EUGENE W. CONNELLY,

*Petitioner,*

*vs.*

COMMERCIAL TRADING Co., INC.,

*Respondent.*

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF  
THE STATE OF NEW YORK, APPELLATE DIVISION FIRST DEPARTMENT

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**BRIEF IN OPPOSITION TO PETITION  
FOR A WRIT OF CERTIORARI**

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Respondent Commercial Trading Co., Inc. respectfully  
submits this Brief in opposition to the Petition for a Writ  
of Certiorari.

**QUESTION PRESENTED**

Did the Supreme Court of the State of New York, in  
granting summary judgment to respondent on the basis of  
*res judicata* and collateral estoppel, deny petitioner the  
right to trial by jury and due process of law, as provided  
for by the seventh and fourteenth amendments to the Con-  
stitution of the United States?

**STATEMENT OF THE CASE**

Respondent Commercial Trading Company, Inc. ("CTC")  
is in the business of commercial financing. American  
East India Corporation ("AEIC") is in the import-export

business. Petitioner Eugene W. Connelly ("Connelly") is the past president of AEIC and is, as described by one of the many jurists who have been involved in this and related cases, suffering from "great emotional disturbance . . . bitterness and confusion" (Pet. 6a).<sup>\*</sup> The controlling facts underlying this suit, as set forth in *American East India Corporation v. Ideal Shoe Company*, 400 F. Supp. 141 (E.D. Pa. 1975), *aff'd*, 568 F.2d 768 (3rd Cir. 1978), are as follows:

From February 19, 1964 until at least July, 1967, CTC provided financing to Walker Trading Corporation ("Walker"), a footwear importer. Walker ordered goods from overseas manufacturers to fulfill orders it had received from domestic companies, and CTC financed these orders by obtaining letters of credit from banks. CTC also advanced money to Walker to cover Walker's payroll and other expenses. 400 F. Supp. at 147. To secure these advances, in 1964 CTC and Walker entered into an accounts receivable security agreement and rider, pursuant to which Walker granted to CTC a security interest in all present and future accounts receivable, contract rights, and the proceeds thereof ("Security Agreement"). UCC financing statements with respect to this Agreement were properly filed and renewed. 400 F. Supp. at 147-48.

In July, 1967, Walker received purchase orders from the Ideal Shoe Company ("Ideal") and the C. R. Anthony Company ("Anthony"). Walker requested CTC to finance these orders but, because Walker was experiencing financial difficulty, CTC insisted that Walker provide it with additional collateral and that Walker reform its manner of conducting business. When Walker was unable to provide CTC with the additional collateral, Walker turned to AEIC. 400 F. Supp. at 149.

<sup>\*</sup> References preceded by the designation "Pet." are to the Petition for a Writ of Certiorari.

In December of 1967, AEIC and Walker agreed that Walker would act as a sales representative for AEIC, obtaining orders in AEIC's name, to be filled by AEIC. As part of this agreement, Walker assigned to AEIC the Anthony and Ideal purchase orders, 400 F. Supp. at 150-51, despite the fact that the Security Agreement between CTC and Walker prohibited Walker from transferring or encumbering any of its accounts, contract rights or other collateral. 400 F. Supp. at 147. AEIC thereafter imported shoes to fill the Anthony and Ideal purchase orders. In February of 1968, CTC learned of the AEIC-Walker arrangement and informed Ideal that payments for merchandise received on Walker orders should be made only to CTC. 400 F. Supp. at 152. Ideal eventually paid CTC, in exchange for CTC's promise to defend and indemnify it should AEIC sue. 400 F. Supp. at 154.

Lawsuits were soon commenced by both CTC and AEIC as a result of their dispute over ownership of these Walker contract rights. In April of 1968, CTC instituted this action in the Supreme Court of the State of New York, seeking a declaratory judgment regarding its right to collect the disputed accounts receivable, as well as injunctive and monetary relief.<sup>\*</sup> AEIC thereafter instituted *American East India Corp. v. Ideal Shoe Company*, *supra*, in the United States District Court for the Eastern District of Pennsylvania, which was defended by CTC pursuant to its indemnification agreement with Ideal.

The *Ideal* case was decided first. After many years of complex litigation, Judge Clifford Scott Green rendered a judgment after trial. In his opinion, Judge Green held that

<sup>\*</sup> Anthony placed the sum of \$66,363.11 in escrow pending the outcome of this litigation. While initially over thirty accounts were in dispute, only the Ideal account which was paid to CTC and the Anthony account which was placed in escrow remain the subject of this action. CTC has voluntarily discontinued its claims for injunctive and compensatory relief.



AEIC's rights with respect to Ideal were limited to those due it as a performing assignee of the Walker contract right. 400 F. Supp. at 155. He then held that, pursuant to the provisions of Article 9 of the Uniform Commercial Code, both CTC and AEIC had a legal interest in the Walker-Ideal contract right and that CTC's interest was superior to AEIC's. 400 F. Supp. at 164-65. However, Judge Green determined that CTC was not directly entitled to the Ideal proceeds, but rather was limited to a damages claim arising out of AEIC's conversion of the Walker-Ideal contract, and that the amount of damages flowing from this conversion was measured by the Walker-Ideal contract price less the cost of performing the contract. 400 F. Supp. at 168-69. Judge Green thus awarded CTC approximately 26% of the disputed proceeds, and AEIC the remainder.

Following the decision in the *Ideal* action, CTC moved for summary judgment in this action, arguing that the *Ideal* judgment constituted *res judicata* and collateral estoppel as to that portion of its complaint which sought declaratory relief with regard to the Anthony account. Connelly, who had been added as a party defendant at his own insistence, opposed this motion, alleging that the *Ideal* decision was based upon perjured testimony. On April 1, 1976, the Court (Rosenberg, J.) granted CTC's motion (Pet. 7a-9a). Thereafter, Connelly moved for leave to reargue, repeating and expanding upon his allegations of fraud and perjury. This motion was denied on May 12, 1976. A second motion for reargument was denied on March 8, 1977. Connelly thereafter made a further motion, denominated "for removal of evidence obtained through perjured testimony," the thrust of which was that CTC deceived the Court by attaching as an exhibit to its summary judgment papers Judge Green's decision in the *Ideal* action. On June 29, 1977, that motion was denied.\*

\* Certain other of Connelly's machinations are described at page 4a of the Petition.

In his April 1, 1976 opinion, Mr. Justice Rosenberg adopted the measure of damages applied by Judge Green, directed the parties to submit affidavits concerning the amounts to be awarded each, and reserved entry of an order pending submission of those materials (Pet. 9a). When a dispute arose as to the sufficiency of Connelly's proof, a trial on the issue of damages was ordered and held before Madam Justice Shainswit on February 21, 22 and 23, 1978.

At this trial, Connelly again attempted to reargue the summary judgment motion, contending that since no order had been entered on Mr. Justice Rosenberg's decision, Madam Justice Shainswit was not bound by it. This argument was rejected on the ground that Mr. Justice Rosenberg's decision constituted the law of the case (Pet. 39). Testimony was then taken and in a decision dated March 21, 1978, the Court issued its findings of fact and conclusions of law (Pet. 2a-6a). In sum, the Court found that AEIC had proven costs in fulfilling the contract of \$51,239.15. Consequently, CTC would be entitled to the amount held in escrow less this cost figure, with the parties to divide the accrued interest on a pro rata basis. A final judgment was entered on April 24, 1978, and the money held in escrow thereafter distributed. On November 21, 1978 this judgment was affirmed by the Appellate Division of the Supreme Court of the State of New York, and on April 3, 1979 the Court of Appeals of the State of New York denied Connelly's motion for leave to appeal. Motions for leave to reargue, addressed to both of these courts, were also denied. This Petition followed.

## REASONS FOR DENYING THE WRIT

### THE GRANT OF SUMMARY JUDGMENT DID NOT DENY PETITIONER ANY SEVENTH AMENDMENT RIGHT TO A JURY TRIAL OR ANY FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Petitioner does not make clear the basis for the Petition. It appears, however, that he is claiming that the grant of summary judgment denied him the right to a plenary trial (Pet. 38-41). Thus, petitioner would appear to be arguing that either his seventh amendment right to a jury trial, or his fourteenth amendment right to due process, was infringed.

The seventh amendment right to a jury trial does not, however, apply to cases brought in state courts. *E.g., Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211, 217 (1916); *Wartman v. Branch 7, Civil Division, County Court*, 510 F.2d 130, 134 (7th Cir. 1975). Equally unavailing is any due process argument. The due process clause only entitles a litigant to reasonable notice and the opportunity for a fair hearing; it does not mandate any particular form of procedure. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974). Thus, the procedural device of summary judgment does not infringe any due process rights. *Fidelity and Deposit Co. v. United States*, 187 U.S. 315 (1902); *Diamond Door Co. v. Lane-Stanton Lumber Co.*, 505 F.2d 1199, 1203 (9th Cir. 1974). Nor does irregularity and error, misconstruction of a state statute, or even fraud by an opponent, constitute a violation of due process. *Patterson v. Colorado*, 205 U.S. 454, 461 (1907); *Corry v. Campbell*, 154 U.S. 629 (1878); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1889); *Thomson v. Butler*, 136 F.2d 644, 647-48 (8th Cir. 1943).

In the instant case, petitioner had more than reasonable opportunity to have his captious arguments considered by fair and impartial tribunals. Petitioner's arguments

were first considered and rejected on CTC's summary judgment motion; his arguments were then further considered and rejected on three subsequent motions attacking the decision granting CTC summary judgment; and his arguments were yet again twice considered and rejected by five Justices of the Appellate Division of the Supreme Court of the State of New York and twice considered and rejected by seven Judges of the Court of Appeals of the State of New York. At every stage of this proceeding, petitioner's arguments were carefully examined, and rejected as totally devoid of merit. If ever due process was afforded to a litigant, it was afforded to petitioner.

## CONCLUSION

**For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.**

New York, New York  
August 24, 1979

Respectfully submitted,

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